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No. 85-1973

In The

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

REPLY BRIEF

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ARGUMENT

I. Neither The "Average Person" Criterion, Ease Of State Appellate Review, Nor the Nature Of This Court's Independent Review, Justify Imposition Of Community Standards Upon The Constitutional Value Test.

Respondent argues that an obscenity determination which utilizes the "average person, applying contemporary community standards" on all three components of the test, including the value element, results in an "objective" determination of obscenity. This conclusion is derived from the purposes of the "average person" criterion, which are to avoid focus on the particularly susceptible person or group and to prevent a finding based on the personal opinion of the trier of fact. Ultimately, respondent equates an obscenity test based completely on community standards with the "reasonable person" test of tort law and brands a value deliberation free of community standards to be "standardless". (Res. Br. at 10-22)

Respondent misconceives the nature and function of the tripartite test of *Miller v. California*, 413 U.S. 15 (1973). Although, at least as to "prurient interest" and "patently offensive", the jury is required to look through the eyes of the "average person, applying contemporary community standards", the ultimate inquiry is into what the hypothetical average person in the relevant community *thinks* or *believes*. In other words, the jury must determine the *opinion* of the average adult in the community as to the acceptibility of certain materials. Such an inquiry, if injected into the value determination, does not focus on the work itself, but determines value based on the feelings of the community.

While "community standards" are in effect a measure of the community's tolerance of sexually explicit materials,[1] toleration or lack of toleration is no gauge of the value of a work. Yet, when material is found to be obscene, community intolerance has already prevailed as to "prurient interest" and "patent offensiveness" and, in all likelihood, these findings become determinative of a value deliberation based solely on community standards. If the existence of a separate value test is to mean anything, it must operate free of such community attitudes and prejudices. Otherwise, the entire focus is upon the societal or governmental interest in suppression at the expense of the individual's interest in publication.

Respondent's argument fails to recognize that engrafting a community framework upon the value test places limitations on the resources from which jurors may draw. Jurors are generally told to use their observations and experiences in life. See RP.C52,RM.C31. These observations and experiences may extend well beyond the relevant community itself, and, based on them, jurors are in a position to determine value, perhaps with some assistance from appropriate evidence. For example, in *Jenkins v. Georgia*,

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[1]*See Smith v. United States*, 431 U.S. 291, 305 (1977) ["contemporary community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community . . ."] (emphasis added); *Miller v. California*, 413 U.S. 15, 32 (1973) ["It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or in New York City."] (emphasis added); *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982) ["It would be equally unrealistic to equate a community's *toleration* for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation."] (emphasis added).

418 U.S. 153 (1974), testimony was offered about the critical acclaim of the motion picture and about an academy award nomination related to the picture. Although not central to its decision, this Court also took note of critical commentary and other information about the film. *See also Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980).

On the other hand, limitation of jury consideration of value to the community works to confine evidence of value to that within the community and to vitiate the jurors' observations and experiences beyond the boundaries of that community. In many cases, the "community" may be no larger than a county or the area from which the jurors are drawn. *See e.g.* Mass Gen. Laws Ann., ch. 272, § 31 (Supp. 1986); Minn. Stat. § 617.241(c) (Supp. 1987); N.H. Rev. Stat. Ann. § 650:1(IV)(a) (1986); Nev. Rev. Stat. § 201.235(1) (1986); Utah Code Ann. § 76-10-1201(12) (1978). The end result is a value judgment which eschews a broader-based determination and which, instead, is formed completely by parochial factors.

Respondent raises appellate review considerations in support of its position. At one point, it argues that a community-based value determination will facilitate state appellate review:

> Respondent seeks only its sovereign right to permit the citizens of Illinois to act as objective arbiters of contemporary community standards, and to permit the appellate courts of Illinois to review obscenity determinations with the benefit of their own perspective of those same standards. (Res. Br. at 22)

* * *

> Further, Respondent stresses again that appellate review is facilitated when a state court of review is required to assess whether a work offends state community standards. (Res. Br. at 28-29)

On the other hand, it points to the independent review of the record commanded by *Miller* and *Jenkins*, categorizing it as "independent *de novo* review" (Res. Br. at 28) and suggesting that petitioners are incorrect in stating that such independent review is in any way limited.

Respondent's positions are inconsistent. While a community-based value determination may aid state appellate court review, the ultimate determination of obscenity under the First Amendment lies with this Court. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting); *Jenkins v. Georgia*, 418 U.S. 153, 164-165 (1974) (Brennan, J., concurring). To suggest that ease of application by state appellate tribunals be the touchstone for the constitutional formulation is to ask this Court to abdicate its constitutional responsibilities. *Miller* rejected that pathway. 413 U.S. at 29-30.

As the petitioners first noted in their original brief, *Miller* and *Jenkins* mandate an independent judicial review by this court, but imposition of community standards necessarily limits that review. This Court cannot be familiar with standards throughout the different "communities" of the United States. Nor could it necessarily glean that information from the record since the prosecution is not required to present evidence of contemporary community standards. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55-56 (1973); *Hamling v. United States*, 418 U.S. 87, 100 (1974). Only a value component free of community standards would allow for complete independent judicial review on at least that one element of the tripartite test.

II. Hamling v. United States, 418 U.S. 87 (1974), Allows No Deviation From Holdings That Require The Reversal Of The Petitioners' Convictions Because Of The Unconstitutional Application Of The Illinois Obscenity Statute.

Relying on *Hamling v. United States*, 418 U.S. 87 (1974), respondent asserts that the petitioners are not entitled to reversal of their convictions, even if they prevail on the underlying issue. While acknowledging that the juries in these cases would have been misinstructed on the application of community standards to the value consideration, respondent argues that petitioners must show "material prejudice". (Res. Br. at 32-34) However, *Hamling* is of little benefit to respondent on this issue.

In *Hamling*, this Court rejected uniform national standards in a federal obscenity prosecution, holding that the relevant community standard was that from which the jury was drawn. Although it acknowledged that the defendant, who was tried prior to *Miller*, was entitled to the benefit of any constitutional principles enunciated in *Miller*, the Court found no prejudice in giving instructions which referred to community standards of the "nation as a whole". *Hamling, supra* at 107. As noted by respondent, this Court made reference to the concern that the material be judged neither on the basis of the personal opinion of jurors nor by its effect on a particular sensitive or insensitive person or group. *Hamling, supra* at 107. It also relied on the principle that jury instructions are to be judged as a whole and recognized the unusual posture of the case in which the instructions were correct at the time they were given by the District Court. The Court concluded as follows:

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the 'nation as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury. . . .
>
> 418 U.S. at 108.

Unlike *Hamling*, the issue in this case does not involve the scope of the relevant community, but rather concerns itself with the constitutional question of whether the community should be taken into consideration at all in gauging value. Furthermore, in *Hamling*, the jurors were instructed on the broader community rather than the narrower community. Here, the jurors received instructions which mandated that they apply community standards to their value determination, thus markedly limiting the perspective from which that element could be viewed. Under such circumstances, it could hardly be asserted that there was no probability that the deliberations of the jury were materially affected.

It is also important to note that *Hamling* was a federal prosecution. Cases relied on by the Court in reaching its conclusion on the instruction issue involved a refusal to apply the plain error rule of Rule 52(b) of the Federal Rules of Criminal Procedure, and therefore imply that the Court may have been applying the harmless error rule of Rule 52(a). *See Pinkus v. United States*, 436 U.S. 293, 297 (1978). Respondent offers no authority articulating a constitutional harmless error rule where state statutes are applied in violation of First Amendment rights. Even if the harmless error rule relating to federal constitutional errors in criminal trials could somehow be applied, the respondent would have to show that it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). The burden is not that of the petitioners.

The cases noted in the petitioners' original brief are clear. The unconstitutional application of the Illinois obscenity statute to them requires reversal of their convictions.

III. It Is Not The Function Of This Court To Give A Saving Construction To The Illinois Obscenity Statute.

Respondent argues that, even if community standards may not be applied to the value element, the Illinois obscenity statute is not facially invalid because it can be constitutionally applied. (Res. Br. at 34-35) It ascribes importance to the fact that, as written, the statute does not command application of community standards to value. This argument overlooks some well-established principles.

The Illinois Appellate Court has effectively construed the Illinois obscenity statute to include community standards in its value determination. In making its constitutional determination, this Court must accept the construction of the statute by the state court, for it is not the task of this Court to construe and narrow state statutes. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369 (1971); *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973); *cf. Miller v. California*, 413 U.S. 15 (1973). As written and authoritatively construed, state legislation may be facially invalidated by this Court. *Cf. Stromberg v. California*, 283 U.S. 359 (1931); *Cox v. Louisiana*, 379 U.S. 536 (1965).

In the event that the Court resolves the underlying issue in favor of the petitioners, the respondent is essentially asking the Court to construe the Illinois obscenity

statute so as to be constitutional. Not only would such action be contrary to developed principles, but it would also be fruitless from a practical standpoint. The State of Illinois has a limited interest in maintaining the Illinois obscenity statute at issue in these cases. As noted in the petitioners' original brief, Illinois now has an obscenity statute which cures the infirmity complained of by the petitioners. (Pet. Br. at 11, 21, App. 4) Just as facial invalidation would have minimum impact upon the administration of the Illinois obscenity statute, a saving construction would lack similar import.

Contrary to respondent's suggestion, the substantial overbreadth doctrine of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) is inapplicable to this case and lends no support to any attempt to save the statute at issue. This statute, as construed by the Illinois Appellate Court, is invalid *in every application* and, for that reason, cannot stand. *Members of the City Council v. Tarpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2124-2125 (1984); (see Pet. Br. at 30-32). This Court should invalidate the statute in its entirety.

CONCLUSION

The respondent has articulated no meaningful rationale for applying community standards to the value determination. Indeed, it is impossible to do so from either a constitutional or policy standpoint. This Court should complete the framework previously laid and clearly affirm the existence of a value test unfettered by community

standards. It should hold the Illinois obscenity statute unconstitutional and reverse the convictions of the petitioners.

Respectfully submitted,

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